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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	MM Docket 92-266

To: The Commission

PETITION FOR RECONSIDERATION

VALUEVISION INTERNATIONAL, INC.

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Summary

The implicit fee model for determining maximum leased access rates is unnecessary in the context of home shopping. Unlike programmers in the other two categories of programming, home shopping networks pay cable operators to obtain non-leased access carriage. As a result, the market has established a rate for channel capacity, which should be used to establish leased access rates. This rate will encourage competitive programmers to use leased access, fulfilling congressional objectives for leased access, without causing migration or undermining the financial condition of cable operators.

The implicit fee model is inconsistent with congressional leased access policy. By establishing inordinately high rates, the implicit fee model will foreclose leased access to competitive programmers, denying the public the widest diversity of programming sources, and preventing competition in the delivery of programming sources.

The Commission should also amend its rules to require the allocation of leased access channels on a non-discriminatory first-come first-served basis. This allocation scheme will ensure that cable operators will not exercise editorial control over leased access programming, or be able to discriminate in affording access to potential competitors.

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PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's rules, ValueVision International, Inc. ("ValueVision") submits the following petition for reconsideration with respect to the leased commercial access provisions of the Report and Order issued in the above-referenced docket. FCC 93-177 (released May 3, 1993) ("Report").[1]

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[1] ValueVision is a television home shopping network that began operation in October 1991. ValueVision currently broadcasts its programming (1) over a network of seven owned or affiliated low power television stations in major markets (2) on

I. THE IMPLICIT FEE MODEL FOR LEASED ACCESS RATES IS UNNECESSARY FOR HOME SHOPPING BECAUSE THERE IS ALREADY AN EXPLICIT PATTERN OF CHARGES FOR HOME SHOPPING CHANNELS.

The Commission adopted a methodology for determining maximum reasonable rates for leased access that is based on the highest "implicit fees" charged by cable systems to unaffiliated programmers for non-leased access carriage. Report at ¶¶ 515-19. Under the Commission's model, cable operators are to identify the unaffiliated programmers they carry on non-leased access channels for each of three categories,[2] calculate the implicit fee charged to each programmer, and identify the highest fee charged within each category. The implicit fee is the difference between the per-subscriber rate "that a cable operator pays to [the programmer]" and the "price subscribers pay to view that programming." Report at ¶ 517. The highest implicit fees thus identified are, "at least initially," the maximum rates cable operators may charge for leased access. Report at ¶¶ 517, 519.

The Commission acknowledged that it had not received many comments relating to leased access. Report at ¶¶ 491, 514. It therefore considered the rules it adopted to be "a starting point that will need refinement." Report at ¶ 491. In

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[2] The Commission determined that it was necessary to separate programmers seeking leased commercial access into three

particular, the Commission viewed its implicit fee model to be an "initial guide until [it] . . . gain[s] more experience in th[e] area." Report at ¶ 515. In fact, this model does not address how maximum leased access rates should be calculated where cable programmers already pay cable operators an explicit fee for non-leased access carriage.

For example, cable operators do not pay home shopping networks to carry their programming. Rather, since their inception, home shopping networks QVC and HSN have typically paid cable operators 5% of their sales revenues (net of returns) to obtain carriage.[3/] In that context, the implicit fee construct is unnecessary, because the market has already established a rate for channel capacity (albeit a rate that is the product of the cable operator's monopsony power, see Report at ¶ 519). Indeed, the implicit fee construct would be inherently absurd if applied to those kinds of programmers who already pay cable systems for carriage. No conceivable justification exists for taking the market rate that has become standard for non-leased channel home shopping use (5% of net sales revenues) and adding to it a per-subscriber fee when the channel is leased. The lessee gets no benefits from the subscriber that the non-leased channel user does not also obtain. Therefore, under no circumstances should

[3/] Some cable operators hold equity interests in some home shopping programmers; such programmers would therefore not qualify as unaffiliated. In such circumstances, the Commission requires leased access rates to be set by reference to the arrangements established by a comparable cable system unaffiliated with the programmer. Report at ¶ 519 n.1313.

the lessee be subjected to an add-on charge based on the number of subscribers.

The implicit fee was first proposed in this proceeding in the comments of several cable operators or cable trade groups. Report at ¶ 507. These comments included a study of the idea of charging implicit fees for leased access. See Stanley M. Besen, Analysis of Cable Television Rate Regulation, Attachment to Comments of Tele-Communications, Inc. Neither the comments nor the Besen study, however, addressed situations in which programmers pay for carriage. Rather, both focus on programmers (e.g., HBO) who are paid by cable operators for their programming.[4]

The implicit fee is a construct that rests on a number of assumptions that may be unfounded. For example, it assumes that each channel on basic service (i.e., from ESPN and Discovery to QVC) is valued equally by the cable subscriber, and therefore that a leased access provider should pay rates based upon the average price of a channel. While such constructs may be unavoidable in other contexts, in the home shopping area a market

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[4] See Besen Study at 54 n.50 (emphasis added):

> "The implicit access fee is the amount the cable operator retains from the carriage of a program service after making all required payments to the programmer. It consists of all additional subscriber and local advertising revenues, if any, minus either the per-subscriber payment or share of revenues that must be rebated to the programmer."

rate for such programming already exists. Reliance on this market rate will, as Congress intended, encourage the widest possible diversity of programming sources and competition in the delivery of video programming. By assuring that home shopping programmers will not be placed at a competitive disadvantage through having to pay supra-competitive leased access rates, use of the market rate will encourage programmers like ValueVision to use leased access as an outlet to compete with existing home shopping networks. This, in turn, will diversify the number of programming sources available to the public.

The market rate will also accomplish these goals without encouraging migration,[5] or undermining the financial condition of cable operators. Because existing, non-leased access programmers QVC and HSN will not be able to reduce their cable carriage costs by switching to leased access, they will have no incentive to do so. Further, reliance on the market rate will ensure that cable operators do not suffer a financial loss as a result of leasing access to their systems. The market rate assures cable operators that they will receive a fee for leased access that is no lower than the rate they are already charging QVC and HSN -- a rate they have already found acceptable in arm's-length negotiations.

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[5] The Besen Study was based in large part on a fear that leased access will result in migration if the rates for leased access are not set "at or near the highest implicit fees that are currently being charged." Besen Study at 58.

II. IN THE HOME SHOPPING CONTEXT, IMPLICIT FEES WOULD BE INCONSISTENT WITH THE HISTORICAL <u>OBJECTIVES OF COMMERCIAL LEASED ACCESS.</u>

For more than twenty years, federal leased access policy, as articulated first by the Commission and later by parties must be given access to the leased channels at rates not designed to prohibit entry." Clarification of the Cable Television Rules, 46 F.C.C.2d 175, 185-86 (1974).

The subsequent Cable Communications Policy Act of 1984 was firmly anchored to this foundation. Section 612(a) of the 1984 Act, 47 U.S.C. § 532(a), states that Congress sought to achieve "the widest possible diversity" of programming sources. Although Congress was aware of an earlier Besen proposal to adopt an implicit fee to determine leased access rates,[7] it did not accept that proposal. And while Congress determined not to regulate leased access rates in the 1984 Act, it intended cable operators to charge rates designed "to encourage, and not discourage, use of channels set aside under this section." H.R. Rep. No. 934, 98th Cong., 2d Sess. 51 (1984) ("1984 House Report"). The legislative history of the Act also indicates that Congress was principally concerned that cable operators not be required to charge rates for leased access that were "beneath [those] being paid by . . . similar, existing service[s]." 1984 House Report at 50. Thus, the requirement that leased access rates not "adversely affect the operation, financial condition, or market development of the cable system"[8] was designed to

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[7] See Options for Cable Legislation: Hearings on H.R. 4103 and H.R. 4229 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. 304-29 (1984) (statement of Stanley M. Besen).

[8] 47 U.S.C. § 532(c)(1).

prevent unfair competition -- not to allow cable operators to obtain revenues in excess of those "being paid by a similar, existing service."[9]

In 1990, the Commission recommended that Congress adopt rate regulation for leased access. Competition, Rate

As noted above, the implicit fee model advanced by the cable industry is not necessary in order to prevent lessees from obtaining access at rates "beneath [those] being paid by . . . similar, existing service[s]." At the same time, that model undermines congressional leased access policies by imposing inordinately high leased access rates.

The Commission has suggested that the implicit fee for carriage on cable systems' basic tier (which is where home shopping networks are typically carried) could be on the order of $.50 per-subscriber per-month. Report at ¶ 518 n.1312. If the Commission's suggestion is consistent with industry pricing practices, few if any competitive programmers in either the home shopping or the "all others" categories will be able to afford leased access. For example, if a not-for-profit programmer in the "all others" category were to lease a full-time channel reaching all the cable subscribers in the Philadelphia television market, the programmer would have to pay leased access fees of over $11 million annually ($.50 (implicit fee) x 12 (months) x 1,867,700 (subscribers)). As the reply comments in this docket

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[10](...continued)
Cong., 1st Sess. 146 (1989) (statement of John Malone). Congress, however, found that cable operators were principally responsible for the low leased access usage. 1992 House Report at 39. Congress also found that cable operators often had financial incentives to refuse leased access to programmers who compete with services already offered by the operator. Id.

have indicated, it is inconceivable that not-for-profit programmers could afford such rates.[11]

Similarly, ValueVision could not afford leased access on such terms. Particularly in markets where it could not secure broadcast carriage through must carry rights, it therefore could not compete against its well-ensconced competitors QVC and HSN. By pricing leased access beyond the means of competitive programmers like ValueVision, the implicit fee model would undermine Congress' goal of guaranteeing competitive programmers a "genuine outlet" for their programming and of assuring the public the widest diversity of programming sources.[12] Given the highly concentrated and vertically integrated state of the television home shopping industry, immunizing cable-affiliated program services from the competition afforded by ValueVision should be of particular concern. Over recent years, QVC and HSN have substantially increased their shares of the market. QVC

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[11] *See* Reply Comments of Center for Media Education at 4 (cable industry's implicit fee proposal "would be unreasonable

acquired CVN, another home shopping network, in 1989 and then essentially eliminated it.[13] QVC's cable subscribers have quadrupled from 11 million in 1987 to 46.3 million in 1992.[14] Similarly, 23.9 million households, via cable or satellite, receive HSN's original programming network, HSN 1.[15] An additional 14.3 million homes receive HSN 2 via cable or satellite.[16]

Now QVC and HSN have significant common ownership -- by large cable MSOs with the obvious power and incentive to disfavor unaffiliated home shopping networks like ValueVision by imposing discriminatory access charges. In February 1993, Liberty Media, Inc. ("Liberty"), a former subsidiary of TCI in which TCI continues to have a "significant economic interest,"[17] acquired

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[13] QVC, SEC 10K at 5 (April 21, 1992) (CVN was "discontinued and the QVC Service was transmitted in its place on those cable systems not already transmitting the QVC Service to their subscribers"). *See also* Minneapolis Star Tribune, Sept. 29, 1992, at 1A (closing of CVN base of operations).

control of HSN.[18] Liberty also owns 30.1% of QVC's common stock, 32.6% of its Series B preferred stock, and 48.1% of its Series C preferred stock.[19] The Chairman of the Board and the President of Liberty are also directors of QVC.[20] Time Warner, Comcast, and a number of other cable operators also hold year of its inception. . . ."[22] Forcing ValueVision to obtain leased access at discriminatory rates would substantially jeopardize effective competition in the home shopping market.

III. THE COMMISSION SHOULD REQUIRE CABLE OPERATORS TO PROVIDE LEASED ACCESS ON A FIRST-COME FIRST-SERVED BASIS.

The Commission should also clarify what priorities should govern the selection by cable operators of channel lessees. The Commission's 1972 cable programming rules provided that "[f]or the leased channel[s], . . . [cable] system[s] shall establish rules requiring first-come non-discriminatory access." 36 F.C.C.2d at 241 (§ 76.251(a)(11)(iii)). Readoption of this method would ensure that, consistent with legislative intent, cable operators will "not exercise any editorial control" over leased access programming, or "in any way consider the content of such programming, except to the minimum extent necessary to establish a reasonable price" for leased access carriage. 47 U.S.C. § 532(c)(2). Further, it would assure programmers that cable operators will not be able to discriminate in affording access to potential competitors. Accordingly, pursuant to its authority to establish reasonable terms and conditions for leased access, 47 U.S.C. § 532(c)(4)(A)(ii), the Commission should amend its rules to require the allocation of leased access channels on a non-discriminatory first-come first-served basis.

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[22] Letter from Acting Assistant Attorney General John W. Clark to Hon. Howard M. Metzenbaum, Feb. 11, 1993, at 2.

CONCLUSION

For the reasons stated above, the Commission should clarify that its "implicit fee" model does not apply in the home shopping context. In that context, the maximum rate for leased access should correspond to the highest explicit fee presently paid for carriage by nonaffiliated home shopping programmers. The Commission should also reinstitute a non-discriminatory first-come first-served selection principle for leased access users.

Respectfully submitted,

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